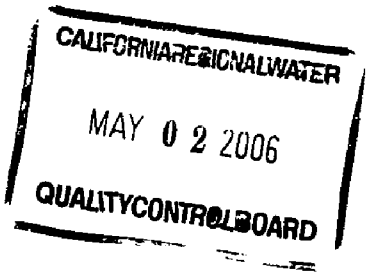
SILICON VALLEY LAW GROUP

A LAW CORPORATION



May 2, 2006

Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Response to Administrative Civil Liability
Complaint No. R2-2006-0002
CRWQCB vs. TWC STORAGE, LLC
Hearing Date: May 10, 2006
Estimated defendant's hearing presentation time: 1 hour

I. INTRODUCTION

The proposed administrative civil liability penalties are fundamentally unfair. TWC Storage, LLC (TWC) is a victim of an accident that it did not cause and did not have the ability to prevent. TWC did not unlawfully abandon the transformers on the property, did not fail to disclose them to the appropriate government regulatory agencies and did not fail to disclose them to the buyer of the property. TWC did not fail to disclose the information in its possession, or information that should have been in its possession, to the demolition contractors. TWC did not pick up the transformer or fail to check its fluid levels. TWC did not break open the transformer. TWC did not present a closure report to the City of Sunnyvale falsely claiming the transformers were properly closed and TWC did not certify the closure without checking on the transformers.

TWC did, at great expense, hire experts to investigate the property prior to purchase. When the accident occurred, and every other entity related to the transformer thought only of how to avoid legal liability, TWC stepped forward, and without any directives from a government agency, promptly reported the release to the neighboring daycare center, hired one of the largest hazardous materials remediation firm in the country, and followed up by hiring one of the top environmental consulting firms in the country. To date, TWC has spent in excess of $1.5 million responding to an accident it did not cause.

TWC is not in the hazardous materials handling business and had no reason, until this accident, to have any dealings with the Regional Water Quality Control Board and it's regulations. Since the accident, TWC has undertaken all investigative and remedial activities required at the site well ahead of any Board directive or schedule. It is unfair and unlawful for TWC be fined on top of everything else it has endured. It adds insult to injury, particularly when there are more culpable parties who the Staff, without any explanation, are ignoring.

II. STATEMENT OF FACTS

1. The Property Purchase

TWC Storage, LLC ("TWC") manages and develops real estate for a wide variety of projects. Until now TWC has never been in the hazardous materials business or involved in violations of hazardous materials laws.

On March 1, 2004, TWC entered into a contract to purchase 1165 East Arques Ave., Sunnyvale, ("Property") from Sunnyvale Community Services. The real owner of the Property was Advanced Micro Devices, Inc. ("AMD") and TWC's negotiations were with AMD, however, in order to create a tax benefit for AMD, AMD chose to sell the Property through a non-profit corporation. The Property is on a federal Superfund site overseen by the Board. By agreement the historical soil and groundwater contamination remained AMD's responsibility.

The Property had previously been owned by Monolithic Memories, Inc. ("MMI"), and used as part of its semiconductor manufacturing business. AMD purchased MMI in the 1980's becoming MMI's corporate successor and the owner of the Property. AMD closed the facility in 1989. At that same time AMD vacated the Property and it remained vacant until demolished in 2005.

As part of the sale AMD was obliged to produce to TWC copies of all non-privileged environmental reviews, site assessments, soil tests and engineering studies for the Property, correspondence with consultants relating to the environmental conditions, correspondence with regulatory agencies, and all other documents related to the condition of the Property. Pursuant to its obligations under the sale contract, AMD made available to TWC 8-10 file cabinets full of environmental related documents to TWC.

Not one document produced by AMD mentioned that there was a transformer filled with PCE on the Property. The only above ground hazardous materials identified in the 8-10 file cabinets were asbestos in the floor tiles and luminescent material in the exit signs.

Prior to closing, TWC and its consultants thoroughly inspected the Property themselves and with representatives of AMD at least two times. AMD and TWC's representatives walked the Property to identify any and all hazardous conditions. In these property walk-throughs the only above ground hazardous materials AMD identified were asbestos in the floor tiles and luminescent material in the exit signs; no mention was made of any non PG&E transformers containing hazardous materials either above or below ground.

The only transformers on the Property that were disclosed by AMD were PG&E transformers. In regard to the PG&E transformers, TWC arranged with PG&E to properly close and remove the PG&E transformers. PG&E was asked if they had any other transformers on site and PG&E emphatically said "no".

Also, prior to purchase, TWC conducted an expensive environmental due diligence investigation. The environmental investigation followed the EPA approved ASTM E-1527-00

standard (TWC-178), using an internationally recognized environmental consulting firm, Clayton Group Services, a Bureau Veritas Company ("Clayton"). Clayton is one of the top firms in the United States for performing Phase I environmental investigations. The investigation of the Property by Clayton was so thorough that the cost for the Phase I environmental assessment was approximately double the average cost of a Phase I environmental assessment. AMD made it clear that any and all documentation on the site was in the 8-10 file cabinets that they provided, and that by studying these files Clayton would have all of the information that AMD had regarding the site.

An item specifically within the scope of the Clayton Phase I investigation was to look for the presence of transformers that contain hazardous materials. (TWC-178). Clayton specifically looked for any transformers that needed to be evaluated as an environmental hazard. As provided for in the ASTM standard, Clayton can rely on reports by other environmental professionals. (ASTM E-527-00 section 6.5.2.1) In this case AMD provided to TWC a C.H.A.S.E. reported dated February 9, 1990, (TWC-1-169) that documented the closure of the AMD's 1165 Arques Ave. facility. Of particular note, is that the C.H.A.S.E. report, (TWC-8), certifies that the Property is closed except for certain specified exceptions. The Energy Center (which is the area where the PCE transformers were eventually found) was not excepted.

The C.H.A.S.E. report showed that no energy related chemicals remain in the Energy Center. (TWC-123) Indeed the C.H.A.S.E. report is so thorough that it lists the 150 gallons of tower treatment chemicals stored in the closed Energy Center that are used in the AMD groundwater extraction system treatment towers to prevent scaling. Consistent with a properly emptied and closed equipment there was no hazardous materials warning placard on the transformers left in the Energy Center. (TWC-532)

In addition to onsite investigations and a review of the documents produced by AMD and interviews with AMD representatives, Clayton checked with the governmental agencies who have jurisdiction over the Property to determine the past and present status of hazardous materials located on the Property. Clayton checked U.S. EPA files, Regional Board files, DTSC files, City of Sunnyvale files, (fire and building department files) and County Environmental Health. (TWC-184-191) Not one government agency had a record of the PCE filled transformers despite the fact that several laws required AMD to disclose the storage of Hazardous Materials. TWC-539. Accordingly, there was nothing in the regulatory record to indicate to Clayton that they could not rely on the C.H.A.S.E. report showing the Energy Center was properly closed.

As a side note, it is important for the Board to recognize that AMD, in fact, knew that it had a PCE transformer on the Property. Tom Delfino, a previous facilities manager for MMI, which was acquired by AMD, was interviewed after the accident occurred, Mr. Delfino informed Clayton that MMI had ordered the transformer and it was delivered by the vendor to MMI with the PCE in it, and placed in the Energy Center when it was built around 1984. The corporate knowledge of MMI is attributable to its corporation successor--AMD. For approximately 20 years MMI and thereafter AMD had an obligation to disclose to government agencies the presence of this hazardous material. TWC-539, 584, 590. Furthermore, when AMD abandoned

the facility in 1989 it had an obligation to dispose of the hazardous materials in the Energy Center.

Based on a thorough investigation of the site with qualified professionals and the information provided by the previous owner, TWC had no reason to believe that it would be encountering any above ground hazardous materials other than asbestos and luminescent exits signs. Toward that end, TWC's contractors specifically, adequately and legally dealt with the asbestos and luminescent exit signs.

Finally, in reviewing the adequacy of TWC's investigation of the Property, the facts are that PCE is an extremely unusual material to find in a transformer. In the early 1980s when MMI was purchasing these transformers, the transformer industry was in the process of moving away from the use of PCBs as a dialectic fluid. The company that MMI chose to buy its transformers from had not yet made the transition to mineral oil, and for a short period of time that transformer vendor experimented with PCE in transformers. Not one person responding to the accident had ever heard of a PCE filled transformer before.

2. The Accident and Immediate Response

With the consent of AMD, TWC hired Qualogy Construction Inc. ("QCI") to demolish the purportedly closed and abandoned structures on the Property. QCI held project meetings with AMD and TWC as AMD was interested in having QCI do their demolition work as well. At no time during those meetings did representatives of AMD warn QCI of even the potential that tanks full of PCE remained in the closed Energy Center. Rather, AMD stated repeatedly that the asbestos and luminescent exits signs were the only remaining hazardous materials of any concern to the demolition workers.

On July 15, 2005, a subcontractor of QCI, Campanella Construction Company ("Campanella"), was in the process of removing the 15-20 pieces of old electrical equipment in the purportedly properly closed Energy Center. There was nothing to indicate that the old rusty abandoned transformer should be treated in any way different from the other old rusty abandoned equipment in the Energy Center. Because the contractor had been informed by AMD that all hazardous materials had been removed from the site, Campanella picked up the transformer with the excavator. Upon lifting the transformer into the air Campanella discovered liquid draining from the bottom of the transformer. The surprised operator moved the transformer away from the daycare center and placed the transformer to drain within what appeared to him to be an existing concrete containment area on top of a pile of soil and other construction debris, which he believed, would absorb and contain the material until its nature was determined. In an attempt to curtail the problem the operator later relocated the transformer to another concrete containment area. Campanella called QCI and a principal of QCI immediately drove to the site.

Although TWC has several real estate investments, its operation on the west coast consists of a small office in Redwood City with two employees. On July 15, 2005 the employee responsible for this development, Mr. Jack May was in Santa Rosa at a business meeting. Upon being informed by QCI that there had been an accident with the transformer, Mr. May immediately called AMD and PG&E to determine the nature of the liquid.

QCI also contacted AMD on the morning of July 15 and requested a contact name for an environmental company to respond to the spill. AMD told QCI to call Ecology Control Industries ("ECI"). However, ECI was unresponsive and rather then wait, QCI elected to immediately find another clean up company. QCI called around and found a safety manager who recommended Clean Harbors, Inc. (the largest environmental clean up company in the United States). That same day QCI called Clean Harbors to retain them to handle the response.

Meanwhile at the Property AMD representatives arrived, took pictures and performed some sampling, they also directed that the spill area and the broken transformer be covered with plastic. AMD did not report the spill and did not contact the daycare center; rather AMD apparently became primarily interested in disclaiming any responsibility.

Around noon on Friday July 15, 2006 a principal of QCI personally visited the Prodigy Child Development Center to inform them of the spill. Also on July 15, in the late afternoon, Mr. May also called Prodigy daycare to let them know there had been a spill.

On Saturday morning at 7:00 a.m., July 16, 2005, QCI met with Clean Harbors' emergency response team and ordered the delivery of equipment to start the removal of the contaminated material as soon as possible. On Sunday morning, a backhoe and two hazardous material roll off bins were delivered. Clean Harbors began placing contaminated soil and debris into the roll off bins until the backhoe broke. Clean Harbors then continued with hand excavation for the remainder of the day.

By Monday morning, July 18, 2005, Clean Harbors had completed the majority of the contaminated soil/debris removal. QCI then instructed Clean Harbors to pump out the second transformer and dispose of the liquids. Clean Harbors continued to work throughout the day.

On Monday July 18 QCI obtained an OES release reporting form, which they emailed to TWC. TWC filled out the form and attempted to fax it, but there was a problem with the fax machine and the fax was not successfully transmitted.

On July 19, 2005, QCI met again with Clean Harbors to review the remediation progress. By that time Clean Harbors had completed all the debris removal as well as completed pumping out the second transformer and removing all liquids from the broken transformer. On July 19, 2005 TWC telephoned EPA and informed them of the release. TWC told EPA that they had retained Clean Harbors and EPA did not recommend TWC call any other agencies.

On July 19, 2005 an inspector from the City of Sunnyvale visited the site and was informed that Clean Harbors had been retained and was undertaking the clean up. The inspector informed QCI that the City of Sunnyvale should be notified when accidents such as this occur. Thereafter the inspector supervised the activities on the site. The inspector found the work was proceeding satisfactorily, although the inspector did require additional site security which was immediately implemented.

On July 22, 2005 additional material was found on the Property and the City of Sunnyvale was immediately called and directed the remediation activity.

3. The Investigation and Clean Up

TWC repeatedly requested AMD step up to its obligations to respond to the spill from the transformer, however AMD repeatedly refused to accept any responsibility. In light of the abandonment of responsibility by AMD, TWC made the prompt decision to go forward and fully respond to the release without delay and leave the eventual legal allocation of responsibility to a later date. With that decision made TWC called Clayton that same week to undertake an investigation and remediation of the site without any delay and without waiting for any regulatory order.

Clayton assigned John Werfal as project manager and Clayton immediately began an investigation on the Property. As soon as Clayton determined what investigation and remediation needed to be done, it informed Staff of the planned investigation and remediation and commenced work. The procedure Clayton used is the professionals at Clayton would first decide what needed to be done, then they would tell Staff and Staff would at a later date send an approval of the work plan and setting an agreed upon deadline. In every instance Staff agreed with Clayton's proposals and Clayton completed the work well ahead of the deadline.

Since the accident, TWC and Clayton have conducted; an extensive sampling program, two large excavations, indoor air testing of the Daycare Center, installation of a soil vapor extraction system and an extensive in-situ chemical oxidation program. Throughout this process TWC has kept the Daycare Center staff up to date on all activities.

On January 27, 2006, after TWC had spent over $1.5 million in responding to the release caused by the undisclosed and unlawfully abandoned transformer, Staff issued an Administrative Liability Complaint for the accidental discharge of Perchloroethylene (PCE). This complaint was issued without any Notice of Violation and without any opportunity to meet with Staff to discuss whether further enforcement or an ACL complaint was justified.

III. SUMMARY OF ARGUMENT

The Board's authority to order investigation and remediation to protect water quality is extremely broad and authorizes the imposition of liability on dischargers based on status and without actual causation or wrongdoing. On the other hand, the Boards authority to impose civil penalties is limited to punishing persons who wrongfully cause discharges. The ACL confuses these two separate categories of authority by attempting to impose penalties on TWC when TWC did not actually cause or permit the release.

The Board may not excessively punish for a single violation. In this case one accident is double charged as a violation of both §13264(a) and §13350(b)(1), and for multiple days when it was one spill on one day.

Section 13264 applies to Waste Discharge Requirements for planned discharges or WDR permit violations. It does not apply to accidental discharges by someone who is not a permit holder. The proper section to charge for an accidental discharge of the type that happened on TWC's property is §13350(b)(1).

The Water Code provides several complete defenses to §13350(b)(1) at §13350(c). Under the Water Code TWC cannot be held liable if (1) TWC did not cause or permit the discharge; **or** (2) TWC was not negligent; **or** (3) the unforeseen act of another party is a material cause of the accident; **or** (4) any other circumstances regarding the accident which causes the discharge despite TWC's reasonable precaution. The facts show that TWC qualifies for several defenses because: TWC did not cause the accident; TWC met the standard of due care for a developer throughout the relevant time period; the negligence of either AMD, Sunnyvale and/or the demolition contractors qualifies as an unforeseen intervening factor; and in light of all the facts, punishing TWC is unfair.

Once the full facts are known it is clear that issuing an ACL was never justified, however Staff did not adequately investigate the accident prior to issuing the ACL. The Staff incorrectly alleged that TWC damaged the transformer. Staff alleged it is common and routine practice to drain fluids out of transformers prior to demolition, but failed to find out that AMD submitted a closure report to Sunnyvale certifying the energy center had been closed. Staff failed to interview QCI, Campanella, or TWC to find out why or if the demolition contractor reasonably believed the equipment was prepared for demolition or to find out the circumstances prior to the incident. Staff failed to learn that QCI immediately hired Clean Harbors and that extensive and effective remedial actions took place during the first four days after the release. The ACL implies nothing was done with the transformer for four days when in fact the transformer was secured, drained and properly disposed of in that time period.

Board procedures were not followed – Staff did not adequately investigate the accident prior to issuing the ACL, did not phase or escalate enforcement efforts, and did not interview any witnesses or parties to the accident. As a result TWC, who has been cooperating fully with the Board, has had to expend considerable resources defending this unfair enforcement action. Furthermore, the clean up program now has been unnecessarily placed in an adversarial posture.

Finally, the Staff did not properly apply the penalty matrix and simply proposed maximum penalties without giving any credit to TWC for the millions it is spending on this matter, or the fact that this was an accident, or the fact that this accident was the fault of others. Proper application of the penalty matrix would result in no ACL and no penalty.

IV. BURDEN OF PROOF

1. Staff must prove every element of the allegations in the ACL by a preponderance of the evidence.

Due process requires the government prove each element of an offense. (*Apprendi v. New Jersey*, (2000) 530 U.S. 466.) The Constitutional concept of due process protects an accused against conviction except upon proof of every fact necessary to constitute the offense

with which he has been charged. (*In Re Winship*, (1970) 39 U.S. 358.) A party bears the burden of proving each fact, the existence or non-existence of which is essential to the claim for relief he is asserting. (Evid C. Section §500) Administrative agencies adjudicating liability must make findings based on a preponderance of evidence. (Cal.Jur. Admin Law §526)

V. LEGAL ARGUMENT

A. The Administrative Civil Liability Complaint Does Not Correctly Apply the Water Code.

1. The ACL confuses the Board's authority to protect water quality vs. its authority to impose penalties

The Board has two separate categories of authority it may exercise. The most common exercise of Board authority relates to its power to hold entities as responsible parties for the purposes of investigation and remediation of waste discharges. In this area, Boards have very broad powers in order to effectuate the statutory purpose of protecting water sources. The Board's power in this area rests in common law concepts of nuisance. (*Modesto RDA v. Superior Court*, (2004) 119 Cal. App.4th 28 *"Modesto"*) In effect, the Board's power follows the CERCLA statutory scheme, which holds owners and operators of property and facilities strictly responsible for discharges. In this capacity, Boards may hold tenants, property owners, operators, contractors, liable as dischargers for the purpose of requiring remediation. (*Zoecon Corporation*, RWCQB Order No. WQ86-11, citing *Rowland v Christian* (1968) 69 C.2d 108. *"Zoecon"*) However, even where its power is at it its zenith in ordering investigation and remediation the Board recognizes that the party actually causing the release should be held liable first. (See *In the matter of San Diego Unified Port District*, Order No. WQ90-3) Owners are secondarily liable to actual polluters.

A separate exercise of Board authority applies to imposing penalties. Different principles of law and policy apply to this exercise. Penalties under the Water Code are not related to paying for an investigation or clean up or compensating the government for its damages. (*RWQCB v. U.S. Navy* (1973) 371 F. Supp 82, 85) Rather, the purpose of these penalties is to punish; deter future violations by the entity involved; and to deter others from violating Board directives. (*U.S. v. Halper* (1989) 490 U.S. 435, 448 overruled on other grounds by *Hudson v. U.S.* (1997) 522 U.S. 93, 101-102. *"Halper"*)

Halper establishes that when a civil penalty serves only to punish, imposing civil and criminal penalty for same act violates due process. *Halper* focused on whether the civil penalty, as applied, served only a punitive purpose. In this case, the Staff's purpose for the proposed double penalties is solely to punish. The facts make the Staff's purpose clear. The purpose cannot be to encourage investigation and remediation, TWC is already investigating and remediating. The purpose cannot be to compensate the government because the Board is already receiving repayment of its oversight costs. The punitive purpose is evident from Staff's admitted reason for applying a "per day" rather than a "per gallon" penalty, which was because the "per day" penalty yielded a higher penalty. (Letter dated March 16, 2006 from Yuri Won to Jeffrey Lawson.) Double charging and quadruple counting of the days of violation demonstrate

a punitive purpose. The failure to properly apply the penalty matrix, but rather to default to a maximum penalty shows the purpose is to punish. Accordingly, a general analysis of the purpose of the penalty is not required. The penalties, as applied to TWC, are solely for punishment and the due process rules for punishment apply.

In the exercise of penalty authority, it is inappropriate for the Board to punish a party who did not commit the violation. Punishing a party simply based on property ownership, without more, violates constitutional protections and does not effectuate any legitimate purpose for punishment. Indeed, it diminishes the value of a penalty because it indicates that punishment is based on arbitrary reasons unrelated to any actual wrongdoing. Furthermore, one of the factors to be considered in ascertaining the appropriateness of multiple penalties is determining the conduct to be prohibited by the statute. (*United States v. UCO Oil Co.*, 546 F.2d 833 (9th Cir. 1976)) Here, the Water Code does not prohibit property ownership but illegal discharge. Yet the Board is seeking penalties against TWC based solely on TWC's ownership of the Property.

Although "discharger" under California water law has never been formally or adequately defined, it is clear that when imposing penalties there is an obligation on the accuser to name the correct party-the party who actually caused the release. Similar Federal law reaches the same conclusion. The clean water act does not impose liability for a third party's failure to comply with the environmental standards. (*Love vs. New York State Department of Environmental Conservation* 529 F Supp 832, 841 (1981)) Due process requires that for accessing a penalty the Board must name the actual discharger and not just any entity connected to the property where the release occurred. Yet here the ACL names the party most attenuated from the act that caused the release and without any investigation, analysis or explanation has not named AMD, QCI or Campanella.

Staff's error in seeking penalties against TWC is caused by the confusion regarding the dividing line between the two areas of Board authority as set forth in the two different provisions of law. The rules for imposing civil penalties are completely different from those that apply to investigation and remediation. Although TWC has a legal relationship to the property as the property owner and developer, that only exposes it to the Board's authority regarding investigation and clean up matters.

2. Multiple Penalties for one spill on one day violate judicial maxims of fundamental fairness, the double jeopardy clause of the Fifth Amendment of the Constitution and the prohibition against excessive fines in the Eighth Amendment of the Constitution.

By seeking to impose a penalty under two sections of the Water Code for the same activity, and increasing the number of days of discharge for one single event to seven times more than the actual facts, the ACL violates judicial precepts of fundamental fairness as well as the Constitutional prohibitions against double jeopardy and excessive fines. This is not a situation where there was a discharge from a pipe or point source over several days or weeks. When Campanella picked up the transformer it ruptured. This was a single isolated event that occurred on one day.

A defendant has a due process right to be protected against multiple punishments for the same act. For at least 60 years, the federal courts have presumed that Congress does not intend a defendant to be cumulatively punished. (*Whalen v. United States*, (1980) 445 U.S. 684, 691-693.) Both the multiplicitous criminal punishment and civil double recoveries offend that sense of fundamental fairness, which lies at the very heart of due process. (*Troensgaard v Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218) As the court in Silvercrest pointed out:

> A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process. (Id. at p.228, emphasis added.)

The United States Supreme Court has held that the double jeopardy clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. (*United States v. Halper*, (1989) 490 U.S. 435, 440, overruled on other grounds by *Hudson v. United States* (1997) 522 U.S. 93, 101-102.)

The Water Code is not immune from these basic tenets of due process. The *Halper* and *Hudson* cases lay out a multi-factor analysis for determining when civil actions implicate the constitutional protections against double jeopardy. That is far more work than the Board needs to undertake in this matter. As explained above the incontrovertible purpose of the proposed penalties in this case is solely to punish. The attempt to punish under two Water Code sections and for four days for what in reality was one act on one day on its face offends fundamental fairness, and implicates both the double jeopardy and excessive fines clauses of the United States Constitution. There is no reason put forth in the ACL that justifies the Board taking such an aggressive and legally risky position.

3. The §13264(a) allegation of a Waste Discharge Requirements violation is inappropriate for an accidental spill.

The ACL Complaint alleges two separate violations for the one accident. The first alleged violation is for Water Code §13264(a), "Waste Discharge Requirements" which provides:

> No persons shall initiate any new discharge of waste or make any material changes in any discharge, or initiate a discharge to be, make any material changes in a discharge to, or construct, an injection well, prior to the filing of a report required by §13260 and no person shall take any of these actions after filing the report but before whichever of the following occurs first: (1) The issuance of a waste discharge requirements pursuant to §13263; (2) The expiration of 140 days after compliance with §13260 if the waste to be discharged does not cause or threaten to create a

> condition of pollution or nuisance and any of the following applies: [CEQA Requirements]; (3) The issuance of a waiver pursuant to §13269. (Emphasis added)

It is clear that §13264(a) applies only to planned discharges and requires obtaining a permit or a waiver prior to a planned discharge. It is entirely inapplicable to accidental discharges. Article 4 of the Water Code (Waste Discharge Requirements) only applies to ongoing and planned waste discharges and permit violations. A basic review of the WDR statutory scheme demonstrates this. Article 4 includes: (1) a detailed annual fee system; (2) provisions for adoption of waste discharge requirements; (3) certain exemptions from permit requirements; (4) pollution prevention plans; (5) injection wells; (6) effluent limitations, etc. These all relate to ongoing and planned discharges. Nothing related to Waste Discharge Requirements are applicable to this accident and that allegation should be dismissed.

B. TWC Is Not Liable Under §13350(b)(1).

1. Only §13350(b)(1) Applies To Accidental Spills.

The second alleged violation is of Water Code §13350(b)(1), which provides:

> Any person who, without regard to intent or negligence, causes or permits any hazardous substance to be discharged in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, shall be strictly liable civilly in accordance with subdivisions (d) or (e).

This is the appropriate section for prosecuting accidental, not WDR, related discharges.

2. The Board may only impose penalties on the party that "caused" or "permitted" the discharge.

To impose penalties on TWC as "the discharger", the Board must do more than simply show that TWC owns the property. The relevant inquiry is whether TWC "caused...any waste to be discharged...into the waters of the state....". The answer is clearly no. TWC neither caused nor permitted any waste to be discharged within the meaning of the Water Code. Legal cause is established only when the act is directly connected with the resulting injury, with no intervening force operating. (1 Witkin & Espstein, Cal.Criminal Law (3 ed. 2000) Elements, § 36, p. 242.) The courts have agreed, stating that liability under §13350(b) does not extend to parties who's involvement is remote and passive. (*Modesto* p.43) TWC had no active involvement in the demolition activities.

Similarly, to impose penalties for "permitting" a discharge the Staff must produce a preponderance of the evidence (and here they have none) showing how TWC permitted Campanella to have the accident. There is no evidence that TWC permitted the release by undertaking an inadequate pre purchase investigation, hiring unqualified contractors or consultants, inadequate project oversight etc. The proof for causing or permitting is essentially

the same and in either instance the facts support TWC; not the allegations in the ACL. There is no evidence proving any facts showing any act or inaction by TWC that caused or permitted the accident. Mere ownership is not an act-it is a status.

3. Section 13350 provides TWC several complete defenses.

The legislature had no intent to hold parties liable for discharges that were not their fault and provided traditional defenses to the imposition of a penalty. Water Code §13350(b)(1) sets forth several defenses at subdivision (c):

(1) [An act of war]
(2) [A natural disaster]
(3) Negligence on the part of the state, the United States, or any department or agency thereof; provided that this paragraph shall not be interpreted to provide the state, the United States, or any department or agency thereof a defense for liability for any discharge caused by its own negligence.
(4) An intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
(5) Any other circumstance or event which causes the discharge despite the exercise of every reasonable precaution to prevent or mitigate the discharge.

The defenses found at §13350(c)(3), (4) and (5) provides a complete defense if a discharger was not negligent, or in other words, used due care, or if another entity's acts intervened or if penalties would be unfair under the circumstances. *City of Brentwood vs. Central Valley Regional Water Quality Control Board* 123 Cal.App 4th 714 (2004) explained that the genesis of the exceptions to liability under the Water Code are based on criminal cases and also apply to civil liability as an affirmative defense. (Pg. 726) Philosophically the defenses are based on the concept that if the release is caused by circumstances outside a reasonably cautious defendant's control then there should be no liability (Pg. 726) In short, penalties are not to be imposed without proof of wrongdoing.

4. AMD's failure to disclose the hazardous materials in the Energy Center and failure to properly close the Energy Center constitutes a complete defense under §13350(c)(4) and the common law.

Even if TWC did "cause" the accident, which it did not, an unforeseeable intervening act of a third party cuts off the chain of causation. (People v. Armitage, (1987) 194 Cal.App.3d 405, 410-421.) Therefore, even if Board Staff could show, which they cannot, that TWC somehow caused the discharge, TWC's causation is superseded by several unforeseeable acts regarding the PCE transformers illegally left on the site. This is a traditional tenet of American jurisprudence (Nunn v. State, (1982) 137 Cal. App.3d 790) and explicitly provided for in §13350(c)(4).

AMD/MMI intentionally purchased and installed the transformers. It is beyond dispute that the Water Code accepts that a person should not be held liable for the intervening acts of others, and that is based on the legislature's acceptance of long standing common law concepts. Intervening illegal conduct is not the type of conduct a party is required to consider in

establishing its own due care. A defendant's conduct is superseded as a legal cause of injury if the intervening force is unusual, extraordinary, or not reasonably likely to happen and is therefore not foreseeable. (Restatement (Second) of Torts § 442(b,c).) (*People v. Armitage,* (1987) 194 Cal.App.3d 405, 410-421.)

The failure of AMD to comply with Hazardous Materials Business Plan requirements, chemical hazardous materials storage requirements, notification requirements and closure requirements, as well as its failure to disclose to the buyer or the demolition contractors are intervening acts by a third party, the effect of which could not have been prevented or avoided by the exercise of due care or foresight within the meaning of Water Code §13350(c)(4). Indeed, the intervening acts are something that AMD could have been held criminally liable for under H & S C sec 25190, 25189.6(a)(b); Sunnyvale Fire Code sec 16.52.503; 42 U.S.C. sec 6928.

5. The negligence of the City of Sunnyvale in certifying the closure of the Energy Center constitutes a complete defense under §13350(c)(3).

The actions of the City of Sunnyvale excuse TWC's liability, if any, within the meaning of §13350(c)(3) because the City was negligent in failing to actively implement and enforce its hazardous materials closure requirements against AMD. If the illegality of the transformer was as easy to detect as the ACL alleges then the City inspector was negligent in certifying the closure. It was this negligence that allowed the transformers to go undetected for 19 years. TWC reasonably relied on the City's certification of AMD's closure. If the City had not been negligent, the presence of this transformer would have been known and this release would have been avoided.

6. The Board has no evidence the demolition contractor was negligent, and therefore even if penalties could be imposed for the wrongful acts of others, TWC is not liable under §13350(c)(5).

TWC is not liable to the Board for penalties for negligence by the demolition contractors. Nonetheless, even if TWC was liable for the demolition contractors' wrong doing, the Board Staff has no evidence of negligence or wrongdoing by the demolition contractors. The contractors exercised due care and TWC's involvement was indirect and passive. This type of circumstance is exactly the type of event the legislature did not want parties penalized for and therefore provided §13350(c)(5) as a complete defense.

The Staff did not consider the facts regarding the circumstances of the demolition. The facts are that: (1) the contractors had been specifically informed by AMD that all hazardous materials had been removed; (2) AMD had disclosed the C.H.A.S.E. closure report and the Energy Center was accepted by the City as closed; (3) the operator had already pulled out several pieces of the Energy Center without incident; (4) The equipment was all old, abandoned and rusty consistent with a closed facility; (5) If the transformers had been drained they still would have had "Perclene" stenciled on them (contrary to the assertion in the ACL that the contractor should have known what "Perclene" is, in fact no one knew what "Perclene" was and PCE is virtually unknown in transformers); and (6) there was no hazardous materials warning placard on the equipment.

In addition to the Staff not considering all the facts prior to issuing the ACL, the Staff has submitted no evidence regarding the standard of care for a demolition contractor. There is nothing in the ACL, or the documents produced by Board Staff, documenting any evidence regarding what a demolition contractor's standard of care is. There is no opinion by experts in demolition contracting, or citation to any guidance for demolition contractors, or even a witness statement that says the demolition contractor was negligent!

The evidence is that the environmental consultants properly relied on the AMD reports, agency records and disclosures made by AMD representatives. The demolition contractors properly relied on the environmental consultants reports and the disclosures made by AMD at the project meetings. This evidence is a complete defense for TWC because it demonstrate reasonable precautions within the contemplation of §13350(c)(5).

C. The Staff Did Not Properly Investigate The Alleged Violations and Did Not Comply With Board Enforcement Policy

Prior to issuing the ACL the Staff took no steps to fully investigate the facts or to identify the actual discharger in accordance with State Water Resources Control Board resolution No. 92-49, B, and its own enforcement policies. The Staff made no effort to resolve this matter informally prior to the filing of the Complaint. In violation of its own enforcement policy procedures, the Staff did not attempt to phase or "escalate" its enforcement efforts by first issuing a Notice of Violation to give TWC (even though not the discharger in this instance) an opportunity to correct the violation prior to commencing formal enforcement. (See, *Guidance, supra*, Section "A. INFORMAL ENFORCEMENT.") [1]

D. The Staff Did Not Properly Apply The Penalty Matrix.

Section 13327 of the Water Code requires the Board to consider ten factors when determining penalty amounts and whether an ACL should be issued at all. (§13327; see also, *Guidance to Implement The Water Quality Enforcement Policy*, April 1996, Amended September 18, 1997, Section IV (B))

Virtually every factor is in TWC's favor, yet the ACL proposes the maximum penalty. The Board is required to consider the statutory factors and general principles of equity when making a determination with regard to the issuance of an ACL or imposition of penalties. It must make specific findings for each factor. Further, it is required to take into consideration all mitigating factors including a defendant's lack of culpability and voluntary efforts to clean up. (*In the Matter of Jeanne McBride, SWRCB Order* No.WQ87-9 (1987))

[1] The Board Staff issued the Administrative Civil Liability Complaint without formal notice within the meaning of 22 CCR §648.1(a). Accordingly other than the cover letter, which provided a date for TWC Storage to submit "written evidence", there are no other procedural limitations or guidance on how TWC can present its case.

> In determining the amount of civil liability, the regional board, and the state board upon review of any order pursuant to Section 13324, shall take into consideration the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup and abatement, and with respect to the violator, the ability to pay, the effect on ability to continue in business, and any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require. (Emphasis added) (Id. at p.8)

In particular, Staff has admitted that they did not follow any written agency enforcement policies in making their determination with regard to penalties, instead they stated that they used the calculation which would generate the highest penalty amount. (*Letter dated March 16, 2006 from Yuri Won to Jeffrey Lawson.).* No weight has been given to TWC's lack of culpability or its voluntary compliance, or the fact that it has no prior history of violations, or that it made its best efforts to discover all environmental hazards at this site prior to its purchase, or to the fact that AMD knew of the presence of this transformer yet failed to disclose it. If the Board Staff had fairly considered each of these factors an ACL would never have been issued.

Even a cursory comparison of the Board's Enforcement policy with the facts of this case reveals the following that was not adequately addressed by Staff:

1. Nature, Circumstance, Extent, and Gravity of Violation and Degree of Toxicity.

> *"These factors address the magnitude and duration of a violation. More fundamentally, they address the impact of a violation and its effect on beneficial uses, including public health and water quality. ...For spills, the main concern is the volume, duration and toxicity of the material spilled. ..."*

The Staff gives little consideration to the circumstances surrounding this spill. No weight has been given to the fact that there was nothing TWC could do to avoid the accident; that TWC performed an extensive due diligence that cost twice as much as normal environmental assessments; or that it properly relied on closure certifications.

2. Degree of Culpability.

> *"Higher ACL amounts should be set for intentional or negligent violations than for accidental, non-negligent violations. ...The test is what a reasonable and prudent person would have done or not done under similar circumstances."*

The Staff completely failed to give this most important factor any weight at all. Instead, the Staff says that the spill was caused by an "operator error" that could have been prevented – a conclusion that flies in the face of the facts, then begs the question by saying the "Discharger"

breached its duty of ordinary care. It does not analyze why TWC and not more culpable entities are the "Discharger". The Staff has completely failed to establish any negligence on TWC's part. It completely fails to provide any evidence regarding what TWC could have done to avoid the accident. The ACL and documents produced by Staff contain no evidence that a "reasonable and prudent person" would have done anything different. The evidence is TWC met its standard of care throughout these events.

3. Prior History of Violations.

"Higher ACL amounts should be set in cases where there is a pattern of previous violations. ..."

The Staff correctly found that TWC has no prior violations but contrary to its own decisional law the ACL proposes the maximum penalty. It is obvious the Staff give it no weight at all, when it should be of the utmost importance in the evaluation.

4. Susceptibility to Clean up and Voluntary Clean up Efforts Undertaken.

"The ACL amount should be reduced to reflect good-faith efforts by the violator to clean up wastes or abate the effects of waste discharges...."

Because the Staff failed to properly investigate the facts of this case, and refused to follow its enforcement guidance policy, it improperly cited TWC for not beginning clean up efforts for four days. In reality, as detailed above, TWC made immediate and significant efforts to address this spill on the very day it occurred and the following four days. Nor does Staff give credit to TWC's $1.5 million spent on this matter or the TWC's complete cooperation.

5. Economic Savings.

"Dischargers should not enjoy a competitive advantage because they flout environmental laws. ..."

The Staff correctly recognized that TWC recognized no economic savings. This was an accident and not an attempt to save money by "flouting the environmental laws." Yet again, Staff gave no weight to this factor and proposed the maximum penalty.

6. Ability to Pay and Ability to Continue in Business.

"Normally assessments are not set so high as to put firms out of business or seriously harm their ability to continue in business. ...Draft USEPA guidance provides one possible method for analyzing affordability. ...."

Here the Staff simply chose to set penalties at the highest possible amount. There is no evidence in the documents produced by the Staff showing on what basis the they came to the unilateral conclusion that the "cash flow" from TWC's business made it capable of paying $40,000 in penalties for a discharge it did not commit. Likewise, there is no evidence that the

Board considered the fact that TWC has already spent over a million and a half dollars in clean up at this site or how this penalty adds to TWC's financial burden.

7. Other Matters as Justice May Require.

"This factor affords the Regional Water Board wide discretion. ...Finally, litigation considerations may justify a reduction in the amount due to applicable precedents competing public interest considerations, or the specific facts or evidentiary issues pertaining to a particular case."

Having made no effort to ascertain the true facts or identify the actual discharger in this matter, it is clear that the Board failed to properly consider this factor at all.

VI. CONCLUSION

The constitutional protections of due process and fundamental fairness mandate that the Staff prove each element of each violation cited against TWC by a preponderance of the evidence, and prohibit the imposition of the multiplicitous charges and penalties.

The Staff cannot prove that TWC caused the incident since they did not attempt any significant investigation prior to issuing the ACL Complaint. Instead of considering the costs of a lengthy adversarial process, Staff immediately served its ACL seeking penalties that offend traditional notions of fairness.

The bottom line is TWC was singled out for selective enforcement for a discharge TWC had no way of preventing or even anticipating. This enforcement action sends the message that people can expect to be punished severely when they do nothing wrong.

TWC did not cause this accident. The ACL should be dismissed.

SILICON VALLEY LAW GROUP
A Law Corporation

By _____
Jeffrey S. Lawson, Attorneys for
TWC Storage, LLC

JSL:edn
Cc: Jack May
Liz Muratet
John Werfal
Gary Grimm